No. 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED, and STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED, *Petitioners*,

v.

STATE OF CALIFORNIA, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MARK R. JOELSON
Counsel of Record
JOSEPH P. GRIFFIN
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7240
Counsel for the Government of the United Kingdom of Great Britain and Northern Ireland

February 12, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1128

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED, and STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED,

Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Having obtained the written consent of the parties pursuant to Rule 37.2 of the Rules of this Court,[1] the Government of the United Kingdom of Great Britain and Northern Ireland ("British Government") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by the London reinsurer defendants and the Response filed by other British co-defendants [2] in support of that petition.

INTEREST OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The British Government has a substantial interest in expressing to the Court its views with respect to this proceeding. The direct focus of the three claims under the United States antitrust laws to which the petition for a writ of certiorari and this *amicus* brief pertain is business activity by British citizens within the London reinsurance and retrocessional insurance markets. Moreover, the plaintiffs' requested relief contemplates injunctions restricting certain conduct in London by the British defendants and, where applicable, their U.S. parents, as well as treble damages.

It is undisputed that British legislation contains extensive provisions regulating the conduct of this same insurance business. As the District Court correctly pointed out, the subject of the three antitrust claims at issue in this petition exists "in a regulatory and competitive framework established by the British Government." 723 F. Supp. 464, 488 (N.D. Cal. 1989). The Court of Appeals, like the District Court, acknowledged that, therefore, application of the U.S. antitrust laws to the London reinsurance market based on the claims at issue here would lead to significant conflict with English law and policy. 938 F.2d 919, 933 (9th Cir. 1991).

[1] The consents are filed contemporaneously with this brief.

[2] Those co-defendants are petitioners in petition No. 91-1146.

Nonetheless, the Court of Appeals concluded that comity did not require abstention from the exercise of subject matter jurisdiction over the claims.

It has long been the policy of the British Government to cooperate with the U.S. Government and the U.S. courts in civil and commercial matters involving conduct deemed to be improper under the laws of both countries. Unfortunately, however, the assertion of certain claims of extraterritorial jurisdiction in antitrust proceedings in the United States has, from time to time, given rise to significant disagreements between U.S. antitrust claimants, on the one hand, and the British authorities, on the other.

In 1978, the Department of State, at the suggestion of the Clerk of this Court,[3] encouraged foreign governments to present their views directly to U.S. courts.[4] Since then, friendly foreign governments have relied on the State Department's position and have presented their views directly to this and other relevant U.S. courts.

This *amicus* brief is submitted to inform this Court of the British Government's views and to support the London reinsurer defendants' request for review. Conduct in the London reinsurance market is for the British Government to regulate. The decision of the court below constitutes an interference with the sovereign rights and interests of the British Government and is, with all due

[3] Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *printed in* Dep't of State, 1978 *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 125 (1979).

[4] Dept. of State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *reprinted in* Dep't of State, 1978 *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 124 (1979). *See also* Letter from Deputy Legal Adviser Marks (June 15, 1979), *described in* 73 Am. J. Int'l L. 669, 678-79 (1979).

respect, both erroneous and damaging to the principles of international law and comity to which this Court has accorded great significance in the past.

STATEMENT OF THE CASE

The complete background of this proceeding has been briefed by the parties. This *amicus* brief addresses solely the jurisdictional issues relevant to the British defendants which are raised in the petition for a writ of certiorari filed on behalf of Merrett Underwriting Agency Management Limited *et al.*

As the District Court observed, the following allegations of the complaints in these antitrust cases [5] are relevant to activity by British citizens in the United Kingdom: The Fifth Claim alleges that the defendant London reinsurers agreed to restrict the terms on which reinsurance would be written and to refuse to reinsure certain risks. The Sixth Claim alleges that, at a meeting in London, the British defendants agreed that all North American casualty reinsurance treaties would be written with a pollution exclusion. The Eighth Claim alleges that in 1987 a group of London retrocessional reinsurers agreed to boycott retrocessional reinsurance treaties that included certain North American property risks unless the original insurance contained certain exclusions. 723 F. Supp. at 484-85.

The District Court held that the longstanding practices in the London reinsurance market challenged by the complaints were "openly conducted in conformity with English law" and were "directed primarily at reducing [the British defendants'] exposure to certain risks and

[5] For the purpose of convenience, reference will be made herein to the Fifth, Sixth and Eighth claims of the "California-style" complaints, which are the Third, Fourth and Fifth claims of the "Connecticut-style" complaints. *Amicus'* statements apply as well to the corresponding claims in other complaints including those brought by private plaintiffs.

controlling losses, a legitimate business purpose." 723 F. Supp. at 488, 490.

Applying the three-part test of subject matter jurisdiction laid down by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-14 (9th Cir. 1976) ("*Timberlane I*"), *after remand* 749 F.2d 1378, 1382-83 (9th Cir. 1984) ("*Timberlane II*"), *cert. denied*, 472 U.S. 1032 (1985), the District Court concluded that the plaintiffs' allegations did not satisfy the international comity requirements of the test because:

> [E]nforcement of the antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy. This conflict, unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline exercise of jurisdiction. *Timberlane II*, 749 F.2d at 1384.
>
> * * * *
>
> The foregoing analysis leads to the conclusion that the conflict with English law and policy which would result from the extraterritorial application of the antitrust laws in this case is not outweighed by other factors. Although the conduct complained of had effects within the United States, it is not alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

723 F. Supp. at 489-90.

Accordingly, the District Court dismissed these claims against the British defendants for lack of subject matter jurisdiction.

On plaintiffs' appeal, a panel of the Court of Appeals for the Ninth Circuit reversed the District Court in this regard, as well as on other issues.[6] In assessing whether

[6] The British Government filed in the court below an *amicus curiae* brief, as well as a brief in support of the London reinsurer defendants' petition for rehearing and suggestion for rehearing en banc.

international comity precludes exercise by the U.S. courts of subject matter jurisdiction over the aforementioned Fifth, Sixth and Eighth claims, the panel opinion reasoned that the enactment of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1988) ("FTAIA") had a profound effect on the *Timberlane* comity test, as follows:

> . . . We do not believe a *Timberlane* analysis (see *infra*) can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has "a direct, substantial, and reasonable [sic] foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

938 F.2d at 932.

The opinion then conducted the *Timberlane* evaluation, and, as to the degree of conflict with foreign law or policy, determined:

> . . . The district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy . . . ." The British [Government's *amicus curiae*] brief reiterates that conclusion; we do not doubt its accuracy. Such a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378, 1384 (9th Cir. 1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032 (1985).

938 F.2d at 933.

However, after evaluating five of the six[7] other factors of the *Timberlane* test, the panel concluded that the only

[7] Without explanation, the panel did not consider the seventh *Timberlane I* factor, *i.e.*, "the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." 549 F.2d at 614.

consideration pointing toward abstention was the conflict with British policy and that this was insufficient to overcome "the weight of the findings already made under the Foreign Trade Antitrust Improvements Act." 923 F.2d at 934.

ARGUMENT

I. INTRODUCTION

This case raises important questions relating to mutual respect between friendly nations and deference to principles of international law and comity. The decision of the Court of Appeals ignores those principles and the weight which this Court has attached to them in numerous opinions. The British Government urges the Court to grant the petition and reverse the decision below. It asks the Court to rule that, consistently with the demands of international law and comity, the U.S. courts should not exercise subject matter jurisdiction over the antitrust claims in this case directed against the British insurance and reinsurance industry with respect to business activity conducted in London in the context of the British Government's regulatory and competition regime.

II. THE DECISION OF THE COURT BELOW DISREGARDS THE BRITISH GOVERNMENT'S REGULATION OF THE LONDON REINSURANCE MARKET AND AUTHORIZES AN EXERCISE OF U.S. JURISDICTION WHICH SEVERELY CONFLICTS WITH BRITISH LAW AND POLICY

As both of the courts below recognized, the London reinsurance and retrocessional insurance businesses are carried on in a framework established by the British Government. The United Kingdom has a long-standing, sophisticated system of insurance regulation. The relevant legislation contains extensive provisions regulating the conduct of the insurance business. In particular, the Insurance Companies Act of 1982 requires that, with certain exceptions, all companies wishing to carry on insurance business in the United Kingdom must be author-

ized by the Department of Trade and Industry. Companies must have adequate initial capital and be managed by fit and proper persons. All authorized insurance companies are required to make regular financial returns to the Department of Trade and Industry. These returns must show that the companies meet the minimum margin of solvency as laid down in the European Community Life and Non-Life Insurance Establishment Directives and that they have reserves adequate to cover their expected liabilities.

That Act also contains provisions relating to the conduct of insurance business by members of the Society of Lloyd's, the detailed regulation of which is governed by the Lloyd's Acts 1871-1982.

As does the United States, the United Kingdom has certain competition law exemptions for insurance. The District Court referred to the exemption from the Restrictive Trade Practices Act of 1976 [8] given to certain (but not all) agreements relating to insurance services by the Restrictive Trade Practice (Services) Order 1976 [9] 723 F. Supp. at 488. However, the conduct of insurance business is not immune from investigation under U.K. competition laws. It is for the United Kingdom to determine how and when such laws apply. The conduct of insurance business may be investigated under the Fair Trading Act 1973 and the Competition Act 1980. These laws provide for the reference and investigation of practices following which, if there are findings adverse to the public interest, the Secretary of State has powers to make remedial orders.[10] Mergers of insurance com-

[8] The 1976 Act consolidated earlier enactments relating to restrictive trade practices.

[9] S.I. 1976 No. 98.

[10] Under the Competition Act there is also the possibility of the Director General of Fair Trading obtaining remedial undertakings. Under the Fair Trading Act undertakings may be given to the Minister.

panies are subject to the merger control rules in the Fair Trading Act.[11] In addition, any change of control of an authorized insurance company requires the approval of the Secretary of State under the Insurance Companies Act of 1982.

Given this framework and the British Government's obvious legitimate interest in the stability and reliability of the reinsurance market in its territory, the conflict in this case arises because plaintiffs ask the U.S. courts to place restrictions on the British industry which is operating under the British regulatory and competition regime and also to subject British nationals to substantial legal liability for conduct in London which the District Court properly found was "conducted in conformity with English law . . . [for] a legitimate business purpose." 723 F. Supp. at 488, 490. The Court of Appeals itself noted the existence of the conflict. 938 F.2d at 933.

The British scheme of regulation, including its competition policy aspects, has its origins in the history of the British insurance industry and of British competition policy, and the way in which the British Parliament has thought fit to legislate on both aspects over the years. It is for the British Parliament in the light of developments, *e.g.*, in the U.K. insurance industry, to decide whether to change the system.[12] It would be inappropriate for the U.S. courts to do so.

The U.S. Government has chosen a regulatory regime for the insurance business that involves substantial con-

[11] The EEC Merger Control Regulation may also be applicable. Council Regulation (EEC) No. 4064/89, 32 O.J. EUR. COMM. (No. L 395) 1 (1989).

[12] Some changes flow from British membership of the European Community. That is quite different from the order of a U.S. court applying extraterritorially U.S. legislation in whose formulation the British Government played no part, and to whose jurisdiction it has not assented.

trol by state governments and an exemption from the federal antitrust laws. An assertion by an English court of a right to order restraints on the operation of the U.S. regime based on concepts of English law surely would be deemed by U.S. courts to be unreasonable and to create a conflict with U.S. law and policy. It is no wonder therefore that the assertion of jurisdiction by the U.S. courts here is viewed by the British Government as constituting an offensive interference with its sovereign rights and significant interests.

III. DISMISSAL OF THE SUBJECT CLAIMS IS REQUIRED BY INTERNATIONAL AND UNITED STATES LAW

It is well established that rules of international law are part of the law of the United States, and that U.S. courts are bound to give effect to international law. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Restatement (Third) of the Foreign Relations Law of the United States* § 111 (1987) [hereinafter cited as *"Restatement (Third)"*]; Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1561-67 (1984). International law limits the authority of nations to assert jurisdiction over matters affecting the interests of other nations.

In particular, personal jurisdiction over a foreign entity by reason of business contacts with a state does not give that state general jurisdiction over all of the activities of that entity anywhere in the world, particularly when the exercise of jurisdiction is inconsistent with the law of the other state where the foreign entity is a citizen and is located.

In recognition of well established principles, the U.S. and U.K. Governments, as well as other Member States of the Organization for Economic Cooperation and Development ("OECD"), have agreed to avoid or minimize

conflicts with foreign laws, policies or interests by following an approach of "moderation and restraint, respecting and accommodating the interests of other Member Countries." OECD *Minimizing Conflicting Requirements: Approaches of "Moderation and Restraint"* 7 (1987). Moreover, in a recent executive agreement [13] the Executive Branch of the U.S. Government recognized that the important interests of the other Party "would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities." [14] Both lower Courts have agreed that such antecedent British Government laws and policy statements exist in this case.

Under international law and the principles of moderation and restraint as they have been applied in U.S. courts, the extraterritorial exercise of a U.S. court's jurisdiction to prescribe or enforce must always be reasonable. A state "may not exercise jurisdiction" when to do so would be unreasonable, after evaluating and balancing all of the relevant factors. *Restatement (Third)* §§ 403, 431.

Assuming that the standard of the FTAIA applies here,[15] the Court of Appeals' view based on the FTAIA that, once the requisite effect on U.S. commerce is established, "it is only in an unusual case that comity will require abstention from the exercise of jurisdiction," misconstrues the FTAIA.

Such a reading of the FTAIA is unsupported and is contrary to the statute's legislative history quoted in

---

[13] Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws. The Agreement is reprinted in 30 I.L.M. 1491 (1991).

[14] *Id.* at Art. VI(1).

[15] For a discussion of the point that the FTAIA applies only to restraints affecting U.S. *export* commerce, see the Petition of Merrett Underwriting Agency Management Ltd. *et al.* at 22-23.

part by the Court of Appeals, 938 F.2d at 932, which expressly preserved the full vitality of the *Timberlane* principle:

> If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3d Dis. [sic: 9th Cir.] 1979 [sic: 1976]), or otherwise take account of the international character of the transaction. H.R. Rep. No. 97-686 at 13 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2431, 2498.

In the FTAIA Congress defined the degree of effect on U.S. commerce that is sufficient to permit a court to assert jurisdiction as one which is "direct, substantial and reasonably foreseeable." If the plaintiff fails to meet its burden of proving that the challenged conduct has such a requisite effect on U.S. commerce, the complaint must be dismissed.[16] On the other hand, even where the requisite effect does exist, Congress intended that the court be free to take account of the international aspects of the case in whatever manner it deems appropriate, *e.g.*, the factors listed in *Timberlane I*.

Since the issuance by the Congress of this guidance with respect to the 1982 FTAIA, this Court has stressed in several other contexts the need for adherence by the United States authorities and courts to the basic standards of international law and comity. *See, e.g., Société Nationale Industrielle Aérospatiale v. U.S. District Court*,

[16] The *Timberlane II* court twice stated that the plaintiff, Timberlane, had failed to carry its burden of persuasion on particular factors. 749 F.2d at 1385. In *Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393 (9th Cir. 1985), the Court of Appeals for the Ninth Circuit held that, although the first two requirements of the *Timberlane* test arguably were satisfied, with respect to the international comity element the proponent of extraterritorial application "*has not established* that the interests of and links to American foreign commerce are sufficient to justify the extraterritorial application of the Lanham Act." *Id.* at 1395 (emphasis added).

482 U.S. 522, 535 (1987) ("the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation"); *Doe v. United States*, 487 U.S. 201, 218, n.16 (1988) ("we are not unaware of the international comity questions implicated by the Government's attempts to overcome protections afforded by the laws of another nation"); and *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 115 (1987) ("a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case" is required.).

This teaching of the Court that the U.S. courts must demonstrate special sensitivity to the legitimate and important interests of foreign nations was ignored by the Court of Appeals. That Court plainly gave inadequate weight to its own finding that the exercise of jurisdiction here would conflict with British law and policy.

The Court of Appeals also erred in holding that the second *Timberlane* factor, i.e., "The nationality or allegiance of the Parties. . . .," pointed towards the exercise of jurisdiction because "the interests of Britain are at least diminished where the parties are subsidiaries of American corporations." 938 F.2d at 933. This holding is contrary to well established principles of international and U.S. law which provide that, regardless of its ownership, a corporation is a national of the country under the laws of which it is organized. *See, e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 n.11 (1982); *Barcelona Traction (Belgium v. Spain)*, [1970] I.C.J. Rep. 3; *Restatement (Third)* § 213.

Finally, the Court of Appeals also erred by not considering the seventh *Timberlane* factor, *i.e.*, "the relative importance to the violations charged of conduct within the United States, as compared with conduct abroad." 549 F.2d 614. The District Court held that as to two of the three claims at issue here (the Sixth and Eighth),

no challenged conduct was alleged to have occurred within the United States. It also held that the alleged conduct in the United States relating to the remaining claim relevant here (the Fifth) was incidental to alleged agreements in London among the defendants. 723 F.Supp. at 490. The unexplained failure of the Court of Appeals to consider the seventh *Timberlane* factor obviously negates its holding that only the conceded conflict with British law weighed in favor of abstention from exercising jurisdiction.

In sum, in the view of the British Government, it is important for this and future cases that the decision of the court below not be allowed to stand. *Amicus* urges that the petition for a writ of certiorari should be granted so that the principles of international law and comity may be given their correct application in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK R. JOELSON
Counsel of Record
JOSEPH P. GRIFFIN
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7240
Counsel for the Government of the United Kingdom of Great Britain and Northern Ireland

February 12, 1992